Office-Supreme Court, U.S.
FILED
JUL 8 1981
ALEXANDER L. STEVAS, CLERK

No. 80-2072

IN THE

# urt of the United States

CTOBER TERM, 1980

---

TOPEKA AND SANTA FE RAILWAY
DENVER AND RIO GRANDE WESTERN
MPANY and SOUTHERN PACIFIC
NSPORTATION COMPANY,
*Petitioners,*

v.

OMMERCE COMMISSION, THE UNITED
RICA, CENTRAL POWER AND LIGHT
and THE STATE OF TEXAS,
*Respondents.*

---

**Writ of Certiorari To The United States Appeals For The Fifth Circuit**

---

# F OF RESPONDENT WER AND LIGHT COMPANY IN OPPOSITION

---

CICERO C. SESSIONS
601 Poydras Street
New Orleans, Louisiana 70130

RALPH B. WESTON
1030 Petroleum Tower
Corpus Christi, Texas 78401

WILLIAM L. SLOVER
*(Counsel of Record)*
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LESEUR
1224 Seventeenth Street, N.W.
Washington, D. C. 20036
(202) 347-7170

t, N.W. *Attorneys for Respondent*
6 *Central Power and Light Company*

S. ADAMS PRINTING, INC., WASHINGTON, D. C.

S PRESENTED

Court to issue a writ of cer-
er the court below correctly
f the Revised Interstate Com-
rrow provision was added to
de special filing procedures
tes "requiring a total capital
00,000 to implement . . . ." *Id.*
epealed by Congress through
ggers Rail Act of 1980, and
went into effect pursuant to
ates, only two could possibly
s review.

is whether this Court should
v the Court of Appeals for
ruction of seldom-used and
29 of the Revised Interstate
ine (a) whether the statute
of a decision by the Inter-
ion approving a capital in-
ection and (b) whether the
the proper standards of judi-
g the Commission's decision.

PROCEEDINGS
APPEALS

the review proceedings

Company* and The
;

Commission and The
Respondents; and

d Santa Fe Railway
Company, The Denver
ailroad Company, and
ation Company, Inter-

y was incorporated on No-
there were 1,378 owners of
on stock is held by Central
has approximately 63,000

Page
..... i
Court of
..... ii
s ..... iii
..... 1
..... 2
..... 7
olve Only
nstruction
Was Ex-
ion When
..... 7
That the
Review-
..... 9
e Proper
..... 10
..... 15
..... 9
*tates*, 606
444 U.S.
... 4, 9, 10, 13
*to Kings*
*sub nom.*
*tates*, 634
*cert. filed*
*C.*, (U.S.
..... 4
*to Coun-*
..... 4, 8

Page
*mith-*
*l sub*
*nited*
*enied*
.... 4, 8
*Co-*
*nom.*
*ates,*
*l* 444
.... 4, 8
*Corp.*,
.... 8
ct of
.... 2
.... 9
.... 5
), 49
ggers
1, *passim*
Stat.
.... 2, 4
.... 4
.... 5
.... 4
.... 5
*Over-*
*gula-*
*e the*
*f the*
*Com-*
979). 14

build
at a l
major
and w
nually
ment
fired f
spirali
had b
fuel c

In
new a
25-yea
tons o
(*Id.*).
only r
(a dis
efforts
ful ag
CP&L
coal. (
the im
the In
or "I
implen
coal tr
the ra
tiation
propos
and th
*Rates*
("*Col*

Sect
in 197

protections
involving e
Congress i
Section 107

> encour
> viduali
> stabilit

H.R. Rep.
*Accord* H.R
(1975).

While Co
ployed whe
dustry in e
filings mad
to impose
Congress co
provision to
Section 210
H.R. Rep.

---

[3] The five fi
shippers. In a
ings involving
*Rate On Coal-*
749 (1979) ("
*Inc.* v. *United*
*petition for c*
(U.S. June 5,
*Belle Ayr, Wy*
("*Council Bl*
*To Smithers*
*Lake*"), *aff'd*
*States*, 606 F.
(1980) ("*Hou*
*Gallup, New*
*chise*"), *aff'd*

(1980); H.R. Rep.
58-59 (1980); S. Re
36-37 (1979).

Though prospecti
not come in time t
being subject to ca
response to the
abbreviated hearing
missions by the p
CP&L's evidence a
rected toward estab
posed by the Petitio
criminatory when m
ratemaking standar
establish the Commi
aside as too high,
the Petitioners exe
CP&L's coal traffic.
duced substantial ev
committed by contra
plier in Axial, Colo
modal or intermodal
portation. CP&L also
that the Petitioners
their proposed rate
Section 10729. (App

On January 15,
decision in response

---

[4] Market dominance is
petition from other carr
transportation to which a

sion found that Petitioner'
Section 10729 treatment (A
the rate exceeded the level
mission's maximum rate sta
However, the Commission
diction to find the proposed
existence of carrier market
established by CP&L. (App

Even though the existence
not a prerequisite to a Cor
rate discrimination, the Cor
ignored CP&L's discrimina
at A-70.) The Commission
to file their proposed rate
C at C-15.) Two commiss
decision and one concurred

On January 15, 1980 CP
States Court of Appeals fo
view of the Commission's d
and the State of Texas join
aside the Commission's co
failed to show the existenc
nance. In a highly unusual
*sion fied no brief in suppo*
*instead sought to have the*
*agency.* Only the Petitione
Commission's decision. Pe
the reviewing court lacked
case to the ICC for reco
errors the court might di
findings involving the lawf

In a decision filed on De
of Appeals affirmed in par

in part and remanded the Commission's January 18 decision. (App. A at A-73.) Specifically, the court affirmed the Commission's finding that the proposed rate qualified for consideration under Section 10729 (App. A at A-17); denied the Commission's request for voluntary remand (App. A at A-18); rejected the Petitioners' contention that the Commission could not reconsider or revise its findings on judicially ordered remand (App. A at A-25); held that the Commission erred in numerous respects in its analysis of the market dominance issue (A-25 through A-68); and held that the Commission erred in failing to address CP&L's discrimination allegations (App. A at A-70). The matter was ordered remanded to the Commission. (App. A at A-73). *See Central Power & Light Company* v. *United States*, 634 F.2d 137 (1980) (*"Central Power & Light"*). A petition for rehearing was granted.

## REASONS FOR DENYING THE WRIT

This case presents the Court with issues whose resolution can only affect the parties to this case, and to a limited extent, the shipper-respondent in No. 80-2068, *Atchison, T. & S. F. Ry.* v. *ICC*.[5] The Petitioners present no important questions which require this Court's resolution and, in any event, the questions they raise were correctly decided by the Court of Appeals.

### I. The Issues Raised by Petitioners Involve Only Technical Questions of Statutory Construction Involving a Repealed Statute Which Was Extremely Limited in Scope and Application When In Effect.

Rule 17 of this Court states that a review on writ of certiorari "will be granted only when there are special

[5] No. 80-2068 was filed simultaneously with the instant case and therein Petitioners duplicate their judicial preclusion arguments.

nd important reasons therefor." *Id.* No such reasons xist in the present case. All that is in issue before the Court is whether the Court of Appeals correctly construed certain parts of a statute that was repealed just our (4) years after its enactment. Only five (5) rates were even filed under Section 10729. One (1) of these lings was rejected by the Commission after finding hat the railroads proposing the rate were using Section 10729 "as an offensive weapon against shippers," *Council Bluffs, supra*, 359 ICC at 205; two (2) were ermitted to be filed in proceedings which have long een completed (*see Smithers Lake, supra; Cochise, upra*); and of the remaining two rate filings, one is at ssue in this case and the other is before this Court in No. 80-2068, *supra.*

During the four year period when only five rates ere proposed for filing under Section 10729, the naon's railroads filed thousands of rail rate schedules ursuant to other sections of the *Act* containing hunreds of thousands of individual rates. *See Southern y. Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 57 (1979). Section 10729 rates thus formed only a inute fraction of the rates filed with the ICC, and resolution of the questions of statutory construction resented for review can only affect the interests of articipants here and in No. 80-2068 as they relate to vo isolated movements of coal. Under these circumances, it is apparent that this matter has no impornce other than to the parties now before the Court nd cannot be considered to be of sufficient importance scope to justify this Court's consideration. Moreer, the issues were correctly decided by the Court of ppeals, as will now be shown.

**t of Appeals Correctly Held That the Commission's Was Judicially Reviewable.**

reason cited by Petitioners for the issuance f certiorari is that the court below erred in t it had jurisdiction to review the Commis- sion and to remand to the Commission for tion of any issues (other than Section 10729 qualification) upon which the Commission committed error. Petitioners present to this tly the same arguments on this issue which have been rejected by two different courts in each of the three (3) cases where they presented. *See Central Power & Light, su-* A at A-24 & 25); *Celanese, supra,* 632 F.2d *uston Lighting & Power, supra,* 606 F.2d at n these cases the appellate courts have e text, structure, and legislative history of 729 and found not even a "hint" (App. A t Congress intended to preclude judicial Commission correction on remand of judi- ified errors in capital incentive rate deci- n less the "clear and convincing evidence" this Court's decisions.[6]

it be said that permitting ICC reconsidera- erroneous findings is "grossly unfair" (Pet. e Petitioners, as they contend. A most basic nsportation law is that shippers are entitled reasonable freight rates. *See, e.g.,* 49 U.S.C. hat is all CP&L requests from the Commis- ven though the result of the application of the present case may result in a rate below d to by the Petitioners, it can hardly be

[6] *Dunlop* v. *Bachowski,* 421 U.S. 560, 567 (1975).

inment of a reasonable rate by a ship-
unfair" to the railroads charging the
*would* be "grossly unfair" to saddle
lawfully high rates resulting from un-
ssion decisionmaking. Since this un-
s been correctly averted by the lower
casion that it has been presented, there
his Court to review these eminently
ations.

ther argue that the alleged unfairness
Appeals' action is heightened by their
at 14) upon their construction of non-
making their capital investments. To
is reliance did occur, Petitioners were
ir reliance was misplaced. Petitioners
sed capital incentive rate schedule for
P&L's coal traffic *after* the Court of
District of Columbia Circuit issued its
*ouston Lighting & Power* case, ruling
determinations concerning the law-
sed Section 10729 rates were subject
w and Commission reconsideration on
ers were parties to the *Houston Light-*
e, knew that it was the only judicial
ng Section 10729, and were aware that
reviewability had been rejected. In
nces any reliance by them on their
atute was clearly unjustified.

**peals Applied the Proper Standard of Review.**

ited reason Petitioners advance for
t is that the Court of Appeals applied
te" (Pet. at 23) standard of judicial

e issue of market dominance.
on the frivolous. The Court
conscientiously set forth the
olied to review the Commis-
owing fashion:

Commission's decisions, we
r standards. Basic is the rule
ourt must consider whether
ed on relevant factors and
en clear error of judgment.
*Overton Park* v. *Volpe*, 401
t. 814, 823, 28 L.Ed. 2d 136
nquiry into the facts is to be
l, the ultimate standard of
ne. The court is not empow-
judgment for that of the
*wman Transportation* v. *Ar-*
*System*, 419 U.S. 281, 285, 95
d. 2d 447 (1974). In the con-
particularly appropriate to
nion, the Supreme Court has

not to be disturbed by the
a showing that they are un-
ence, were made without a
stitutional limits, or for some
nt to an abuse of power.'
*Co.* v. *United States*, 246 U.S.
33, 389, 62 L.Ed. 831] (1918).
served, 'The process of rate-
ly empiric. The stuff of the
d changing the resultant of
e valued as well as weighed.
fore delegated the enforce-
tion policy to a permanent
s charged it with the duty of
o the dynamic character of
blems.' *Board of Trade of*

*ates*, 314 U.S. 534, 546
d. 432] (1942).

*Fe Ry. Co.* v. *Wichita*
00, 806, 93 S.Ct. 2367,
). (footnote omitted.)

e afforded agency ac-
a reviewing court set
o be arbitrary, capri-
n, or otherwise not in
U.S.C.A. § 706(a)(A)
this theme inform us
rn from a decision the
's conclusions and the
*tomac Electric Power*
F.2d 1058 (D.C. Cir.
t a decision means be-
to say whether it is
*es* v. *Chicago, Milwau-*
*oad*, 294 U.S. 499, 511,
1023 (1935). Also, an
m itself to its prior
lain the reason for its
*griculture* v. *United*
Ct. 826, 98 L.Ed. 1015,
*rp.* v. *Federal Energy*
0 F.2d 763 (5th Cir.
*Packing Co.*, 557 F.2d
see *Frozen Food Ex-*
535 F.2d 877 (5th Cir.
s in mind, we turn to

The court consistently
enets of judicial defer-
on's decision.'

urt's supposed "intensively
aced the Commission's deci-
t 25-26). The Court of Ap-
ial duties with appropriate

the standard
s "conflicts"
Court of Ap-
t in *Houston*
g this argu-
language in
which states
iew of Com-
applied with
F.2d at 1145.
D.C. Circuit
this "extra

nally used in
ations *is not*

explained at
gs, the Com-
ts obligation
e factors ma-
posed capital
nd that "the
ation of pro-
withhold fair
ther a direc-
irst order of
F.2d at 1142.
e standard of

---

ssion's decision
) The length of
l "complexity"
rt. Petitioners'
of the Court of
e without merit.

consistent
*g & Power*
uit decision
hat the nu-
ion in this
uld require
's decision

rongly that
represented
ry previous
minance in
movement.
it is widely
Witness, for
ngressional
nd analysis

*leto Creek*
tal mandate
re from the
ns and pre-
stand, this
on for cap-
ught to as-

*tion: Over-*
*Regulatory*
*Subcomm.*
*ouse Comm.*
. No. 96-74,
ws were di-
by the De-
xas, each of
arket domi-